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No. 515

In the Supreme Court of the United States

October Term, 1933.

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner,

vs.

THE NEWPORT COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

STATEMENT OF THE CASE.

The statement in the brief for the petitioner omits some of the most important facts and does not fairly present the case. As questions of fact are raised which call for a review of the entire record, we ask leave on behalf of the respondent to make a full statement of

the facts in proper sequence, instead of attempting to supplement the statement of the petitioner. The statement which follows is intended to include all material facts.

STATEMENT OF FACTS.

In the year 1919 the Newport Mining Company organized under the laws of *Maine*, the Dunn Iron Mining Company organized under the laws of *Wisconsin*, the Newport Chemical Company organized under the laws of *Maine*, and the respondent organized under the laws of *Delaware*, and certain other corporations were all owned and controlled by the same five individuals, Ferdinand Schlesinger, Mathilde Schlesinger, his wife, Armin A. and Henry J. Schlesinger, sons, and Gertrude MacLaren, daughter (R. 34, 36).

About July 31, 1919, all the assets of the Newport Mining Company were transferred to and divided between the Steel and Tube Company of America, another corporation (State of incorporation and stock ownership not shown), and the respondent (R. 38). The nature of this transaction *or the consideration paid by the transferees for the assets so received is not shown.* About the same time (precise date not shown) the *Newport Chemical Works Inc.*, referred to herein as the taxpayer and hereafter called the Chemical Company, transferred its assets to the *respondent* in consideration of the issuance of its stock to the stockholders of the *Chemical Company* and the assumption of all the liabilities of that Company (R. 17); and the *Gogebic Steel Company*, an Indiana corporation (R. 34, 36), and *Western States Coke Company* (State of incorporation or stock ownership not

disclosed), likewise transferred their assets to the respondent upon the same terms (R. 15). Thereby the stockholders of the *Chemical Company* in exchange for their stock became the holders of stock in a corporation (the respondent herein) organized *under the laws of another state* with assets which included the assets of the Chemical Company, but also other assets. There is no evidence in the record *that the respondent succeeded to or carried on the business of the Chemical Company,* or that it was authorized to do so under its charter. The charter of any of the companies or anything to show the purposes for which any of them was organized, was not offered in evidence.

The Newport Mining Company (hereafter called the Mining Company), the *Chemical Company* and the Dunn Iron Mining Company, were affiliated corporations (R. 17, 36). The Mining Company filed a consolidated return for the year 1917 in which was included the returns of the Dunn Iron Mining Company and the Chemical Company as affiliated companies. The Chemical Company originally had filed a separate return which was later included in the consolidated return of the Mining Company for excess profits taxes (R. 18, 128, 129). The return was filed April 1, 1918 (R. 18).

On March 1, 1920, following the transfer of all their assets in the middle of the year 1919, the *Mining Company* and the *Chemical Company* were dissolved by decrees of the Supreme Judicial Court of Maine, by suits in equity in accordance with the practice in equity, as authorized by a statute of the state (R. 19, 21). Their corporate existence was continued thereafter by statute, for three years, to settle and close their affairs (Rev. Stat. of Maine 1916, Chap. 51, Sec. 81). It was

conceded that they continued in business up to the time of their dissolution March 1, 1920 (R. 21, 22).

As stated above, the *respondent*, the *Chemical Company*, and the *Mining Company* were owned or controlled by the same persons at the time of the transfers above referred to and of the dissolution of the transferors. *The identity of interest between the five persons named and the respondent which existed at the time of the transfers, did not continue after the year 1922.* In that year *H. J. Schlesinger* one of the five who had owned or controlled all three corporations, sold out all of his interest in the *respondent* and thereafter had no connection with it (R. 28). *This fact is omitted from the petitioner's statement.* There is no evidence that the other four retained any interest in the *respondent Company* after that time, except as may be inferred from the fact that A. A. Schlesinger was its president in the year 1926 (R. 60, 62). What his stock interest was then, or previously, is not shown.

The period prescribed by the statute for making any assessment of the Chemical Company expired *March 1, 1923.* An unlimited waiver had, however, been executed by it December 15, 1920, before it went out of existence, signed E. G. Wilmer, vice-president, the validity of which, while it lasted, is not questioned. It is admitted that it lasted only until *April 1, 1924,* when it was terminated by proclamation of the Commissioner issued April 11, 1923 (R. 161; Pet. Br. 29).

The *first claim of any deficiency in tax* against the Chemical Company was made in *August 1923,* in a 30 day letter of the Commissioner addressed to the *Newport Mining Company* based upon an examination of

its consolidated return in which the return of the *Chemical Company* was included as an affiliated company (R. 39, 46). The total deficiency proposed to be assessed against the Mining Company and *its affiliated companies* was $578,335.17 of which the amount proposed to be assessed against the *Chemical Company* was $116,065.49. The claimed deficiency for the Mining Company alone, was $187,966.47 (R. 45). To that letter *H. J. Schlesinger who had then no interest in the respondent* and no connection with it, replied August 28, 1923, as follows:

"Commissioner of Internal Revenue,
Washington, D. C.

Reference IT:NR:G:EFS-5

Dear Sir:

Referring to your letter and accompanying report of August 13, 1923, in which we are advised of an additional assessment of The Newport Mining Company and its subsidiaries to the amount of $578,335.17 and are allowed thirty days within which to file exceptions, it is not clear to us from the report as to how the basis of the tax with respect to some of the most important items was arrived at, and it is necessary to enable us to prepare the proper exceptions to obtain some further information as to the basis of the tax.

Will you, therefore, please advise us of the earliest date that a brief conference can be ar-

ranged for at which time our representative may obtain the additional information required. As considerable work will have to be done to properly present our exemptions [exceptions] and the time is limited, may we ask you to kindly answer at once by wire at our expense or by return mail.

Very truly yours,

THE NEWPORT MINING COMPANY
By H. J. Schlesinger,
Vice-President."

(R. 45, 46.)

Following that letter, in October, 1923, an appeal was taken in the name of the *Newport Mining Company* from the letter of the Commissioner referred to in the letter of H. J. Schlesinger (R. 35, 38). The appeal was signed "The Newport Mining Company by Charles F. Fawsett, General Counsel." The Commissioner was advised in the *verification* that the *Newport Mining Company* was dissolved *in the early part of the year 1920,* at which time it had transferred all of its assets to the *Steel and Tube Company of America,* and the respondent. The verification was by H. H. Springford as Vice-president of the dissolved Mining Company *up to the time of its dissolution,* and as the then president *of the Steel and Tube Company of America,* and vice-president of the *respondent* (R. 38). It was stated in the instrument that the appeal was taken by the *Newport Mining Company* for itself and on behalf of each of its *affiliated companies* referred to in the 30 day letter. The affiliated companies re-

ferred to, eleven in number, were set out in the appeal among which was the *Chemical Company* (R. 36). Following the appeal an instrument purporting to be a waiver for the *Mining Company* and *its subsidiaries* was executed *December 11, 1923*, in the name of the *Newport Mining Company* by H. J. Schlesinger as Vice-president *and signed by the Commissioner* (R. 56). This instrument is omitted from the petitioner's statement of the facts and is not referred to in his brief. It is inserted as *the initial waiver* executed by *H. J. Schlesinger* for the *Chemical Company* as one of the Affiliated Companies of the *Mining Company*. At that time the *Mining Company* and also the *Chemical Company* had ceased to exist, their corporate existence having terminated under the Maine statute March 1, 1923. At the time of the execution of that instrument the Commissioner, who accepted and signed it, *had notice of the dissolutions of both companies* and of the date thereof, as shown by the following:

In the corporations' questionnaire, filed by the respondent *April 14, 1920*, the Commissioner was informed that both the Chemical Company and the Mining Company *were in process of dissolution during 1919 and that their stock had been cancelled* (R. 68). In the return of the *Chemical Company* filed March 8, 1921 for the year 1920 he was informed that the Company was no longer active and had no income for the year 1920, and in the letter enclosing the return he was told, *"You will further note that the company's affairs have been wound up and the company legally dissolved"* (R. 64, 54; Italics ours). *No return was filed by or for the company thereafter.*

In a letter dated August 10, 1921, addressed to the respondent the Commissioner referred to the state-

ment in the corporations' questionnaire to the effect that *both the Chemical Company and the Mining Company were in process of dissolution and their stock cancelled in the year 1919* and requested to be informed of the exact dates of the surrender of their respective charters, and of the status of the companies *in the years 1917 and 1918* and if the same conditions did not obtain in those years that he be given *complete information as to their status in those years,* and that the information requested be furnished in affidavit form (R. 65). The respondent replied August 26, 1921, giving in full detail the information requested, verified by its secretary in which the date of the dissolution of the *Chemical Company* and the Mining Company was given as March 1, 1920. The affidavit further stated that they were in process of dissolution from and after July 30, 1919 and the interval between that date and the date of the decree of dissolution March 1, 1920, was necessary to accomplish transfers of the property and the legal formalities in connection with their dissolution (R. 66, 67). June 17, 1922, in another letter to the *respondent* the Commissioner again referred to the corporations' questionnaire filed by respondent for the year 1919, and to its consolidated income and profits tax returns for the years 1919 and 1920, and advised it that the *Chemical Company* should be included in the consolidated return for the year 1920 *"to date of dissolution, March 1, 1920,"* and that the *Newport Mining Company* from July 1, 1919, *to the date of its dissolution March 1, 1920,* was not affiliated with respondent and should file a separate income and profits tax return for that period (R. 71, 73). The respondent replied in a letter dated July 27, 1922, in which it stated, *"Newport Chemical*

Works Inc. (Maine) to date of dissolution, March 1st, 1920, has not been included in the return for 1920 for the reason that this Company transacted no business whatsoever during the year" (R. 74). In the verification attached to the appeal of the *Newport Mining Company* for itself and subsidiaries in October, 1923, as before stated, the Commissioner was expressly informed that the company had been dissolved in the early part of the year 1920 (R. 38).

With this information of the dissolution of both the *Mining Company* and the *Chemical Company* before him or on file in his office, the Commissioner on the *11th of February, 1924,* addressed a letter to the *Newport Mining Company,* referred to its appeal of October, 1923, and stated that waivers executed by it had been received, but he desired waivers *for its subsidiaries, thirteen in number,* named in the letter, one of which was the *Chemical Company.* The instruments he desired executed, *16 forms of waivers,* were enclosed (R. 75, 76). The instruments offered in evidence as waivers each had attached the statement:

> "If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed" (R. 132, 133, 134, 136).

In reply to that request which was addressed, as stated, *not to the respondent,* but to the *Newport Mining Company,* a number of the instruments called for

were returned presumably executed, in a letter dated February 23, 1924, written on stationery of the respondent, signed "*C. W. Westerman, Secretary*" (R. 63). It was admitted that Mr. Westerman was the secretary of the respondent at the date of the letter (R. 64). There was, however, no evidence offered that he was authorized by the *respondent* to transmit the instruments referred to in his letter which besides one for the *Chemical Company* included waivers for a number of companies *which so far as the record discloses were going corporations responsible for their own tax liabilities, and with which the respondent had no connection.* A. A. Schlesinger, the chief executive officer of the respondent was on the stand as a witness for the petitioner (R. 26) but was not questioned as to Westerman's authority. There is no evidence in the record that Westerman had anything to do with procuring the execution of any of the instruments. The only instrument offered in evidence which is claimed to have been among those enclosed in Westerman's letter is one undated, stamped "*Received, Feb. 26, 1924,* E. D. S. ..... Audit Division" (R. 131-132). There was no evidence to authenticate the stamp. The instrument was signed in the name of the *Chemical Company by H. J. Schlesinger,* Vice-president, purporting to extend the period for assessing that company (R. 56). It was objected to as incompetent and irrelevant (R. 76). *It is admitted this instrument expired by its terms April 1, 1925* (R. 62; Pet Br. p. 29).

Under date of December 3, 1924, the Commissioner with the notices on file that he had had of the dissolution of the *Chemical Company* March 1, 1920, addressed a letter to it, advising it of a tentative determination of a deficiency in tax against it in the sum

of $226,710.08, based on a ruling that it was not affiliated with the *Newport Mining Company* or any other corporation for the year 1917 and that its tax liability had been determined on a non-consolidated basis (R. 46-48).

To that determination protests by the *Newport Mining Company*, the *Dunn Iron Mining Company* and the Chemical Company were filed based on the ruling of the Commissioner *that the three companies were not affiliated* (P. 50, 51). The protests were forwarded to the Commissioner in a letter dated December 26, 1924 which after referring to the protests enclosed, stated:

> "We also enclose new waivers for the year 1917 for the Newport Mining Company, Newport Chemical Works Inc., *Newport Turpentine & Rosin Company of Florida, Newport Turpentine & Rosin Company, Incorporated*, and *Gogebic Steel Company.*
>
> The waivers for the *Dunn Iron Mining Company*, Harrow Spring Company, Northwestern Light & Power Company, Northwestern Lime, Stone & Slag Company, Northwestern Milling Company, Harvest Farms Company and Northwestern Iron Company will be forwarded by the *Youngstown Sheet & Tube Company* with the protests of the Northwestern Iron Co. and Harrow Spring Co. all of which we trust you will receive in proper order and in due season" (Italics ours).

The letter was signed, "Charles F. Fawsett, General Counsel" for all of the companies referred to in the letter.

The petitioner offered in evidence an instrument dated *December 23, 1924*, purporting to be *a consent in writing by the Chemical Company* to an extension of the period for its assessment, signed *Newport Chemical Works Inc. Taxpayer*, by *H. J. Schlesinger*, Vice-president and by D. H. Blair, Commissioner (R. 57, 58). Stamped thereon were the words "Consolidated Returns Audit Division, Dec. 31, 1924, Asst. Head of Division." The stamp was not signed and was not authenticated by any evidence. *The instrument was objected to as incompetent and irrelevant* (R. 76). It is claimed by the petitioner that this was the waiver for the Chemical Company referred to in the above letter dated December 26, 1924. The evidence showed that Charles F. Fawsett, who signed the letter, was counsel for the *Chemical Company* prior to its dissolution and acted as counsel for the respondent after the dissolution of the Chemical Company *but only in matters that were specially referred to him.* The company had another attorney who had charge of all of its legal work and only matters were referred to counsel that the regular attorney of the company could not decide for himself or when he wanted a corroboratory opinion (R. 28). There was no evidence that Mr. Fawsett was employed *by the respondent* to transmit the protests and waivers referred to in the letter. The *respondent* was not among the companies referred to in the letter. The protest of the *Chemical Company* which was inclosed in the letter, *was not offered in evidence.* The name of the *respondent* does not appear in connection with the protests of the *Newport Mining Company* and the *Dunn Iron Mining Company* which were offered. The verification of those protests which states that it was made particularly on behalf of the Newport Mining Company and the Dunn Iron Mining

Company (R. 51) *makes no reference to the respondent.* Of the three companies purporting to join in the protests the *Dunn Iron Mining Company* insofar as anything to the contrary is shown, was a live corporation, having a common interest with *the two dissolved companies,* in the subject matter of the protest.

December 14, 1925, the Commissioner addressed a letter to the defunct *Chemical Company* proposing *another redetermination of its tax liability for the year 1917,* in the sum of $211,227.75 (R. 53, 54) in which it was stated:

> "You are granted 30 days from the date of this letter within which to present a protest, supported by additional evidence or brief, against this determination of a deficiency. Any additional evidence submitted should be under oath. Upon request submitted within the period mentioned, you will also be granted a hearing in the Bureau with reference to the matter" (R. 53).

In response thereto, *an unsigned instrument* was filed purporting to be a protest of the *Chemical Company,* and the *Newport Mining Company.* Attached to it was an affidavit of *A. A. Schlesinger,* sworn to February 8, 1926 (R. 56-60), and set out in full in petitioner's brief (pp. 9-10). In the body of the instrument to which the affidavit related, it was stated that the entire basis of the protest was the *omission of the Commissioner* to take into account in the determination of the tax liabilities of the *Chemical Company,* a previous ruling made by him the date of which was referred to, in which he had held that the *Chemical*

Company was affiliated with the *Newport Mining Company* for the year 1917 (R. 59). The instrument contained an offer to file waivers and stated that the instrument itself might be considered a waiver until formal waivers could be prepared and filed (R. 60).

Attention is directed to the fact that the verification of the instrument does not purport to be made on behalf of the respondent or by its authority. The instrument itself was not signed *by the Commissioner* or by *anyone. There is no evidence in the record that it was acknowledged or that it was ever referred to in writing or otherwise by the Commissioner.* There was no evidence as to how it came to his hands.

The remaining instruments offered as waivers was one dated January 12, 1926, purporting to be a waiver by the *Chemical Company* of the time prescribed by law for making assessment against it, signed in the name of the *Chemical Company by H. J. Schlesinger as vice-president,* effective to December 31, 1926 (R. 61), (with no evidence of how it was transmitted or came to the hands of the Commissioner), and the instrument, dated November 6, 1926, executed by the respondent (R. 62).

STATUTES INVOLVED.

The statutes involved are set forth in the appendix to the petitioner's brief.

QUESTION PRESENTED.

It is conceded in petitioner's brief that the authority of the Commissioner to make the proposed assessment, depends upon the validity of the instruments relied on as waivers (p. 16). It is admitted that all of these instruments that were received by the Com-

missioner *before the passage of the 1926 Act*, expired before the passage of that Act, *with the exception of three* beginning with the one dated *December 23, 1924* (R. 57, 58). The question in the case is whether any of *these three instruments*, or the one dated November 6, 1926, *after the passage of the 1926 Act* executed by the respondent was sufficient to authorize the proposed assessment.

SUMMARY OF ARGUMENT.

The evidence was amply sufficient to support the findings of the Board of Tax Appeals confirmed by the decision of the court below that the period for assessing the taxpayer (the *Chemical Company)* had expired before the passage of the 1926 Act. H. J. Schlesinger, who executed the instruments in the name of the *Chemical Company* after it ceased to exist, relied on here by the petitioner to extend the period for assessment beyond the effective date of the 1926 Act, *was himself a transferee of the dissolved corporation*, and as such liable for its taxes. He had no interest in or connection with the *respondent* at the time of the execution of these instruments. There is no evidence that the respondent procured their execution or authorized the same.

There are no grounds for the contention that the decree of the Supreme Judicial Court of Maine which dissolved the *Chemical Company* March 1, 1920 was void or not effectual to dissolve the corporation. The necessary parties were before the court and it had jurisdiction of the subject matter.

There is no basis in the record for the application of the doctrine of estoppel. At the times of the re-

ceipt of the instruments purporting to be executed by the *Chemical Company,* the Commissioner had full knowledge *that the Chemical Company had ceased to exist* and that no waiver could be executed by it or with its authority, *and there could be no extension* of the period for its assessment. There is no evidence in the record that he was misled by any representation, act or conduct of the respondent. *The Board of Tax Appeals expressly found that he was not.*

The instrument of November 6, 1926 executed by the respondent after the passage of the 1926 Act was ineffectual to authorize the proposed assessment of the respondent as a transferee for the reasons—

(1) The bar of the statute having fallen before the passage of the 1926 Act against any assessment of the taxpayer, Section 280 authorizing assessment of transferees was inapplicable to the respondent. It could not be made applicable by any agreement between it and the Commissioner.

(2) The instrument was void on its face. By its terms it merely purported to waive the period prescribed by law for assessing the *Chemical Company* described as the taxpayer in the body of the instrument, *for taxes due from it.* Clearly a transferee is without authority to extend the period for assessing its transferor. A waiver is a voluntary relinquishment of legal rights and its terms, where in writing, must be strictly construed. Construed in accordance with its terms, this instrument *showed on its face* that it was executed without authority for the purpose for which it purported to be executed. It did not purport to extend the period for assessing the respondent as a transferee, *except as the period for assessing the trans-*

feror might be extended. If it was not effective to extend the period for assessing the transferor, it was not effective at all. The meaning clearly expressed by its terms, cannot be enlarged by construction. There is no provision in the statute for extending the period for assessing a transferee *except as the period for assessing the taxpayer may be extended.* No one can of course do that other than the taxpayer himself or one acting by his authority.

(3) At the time of the execution of the instrument all liability of the taxpayer for taxes referred to therein had been discharged by the operation of Section 1106 of the 1926 Act. When liability for the tax was discharged *the foundation of the authority* of the Commissioner to make any assessment therefor, *was destroyed.* It could not be reconstructed or restored by any waiver by the transferee. The authority for making an assessment can be conferred only by statute. Section 612 of the 1928 Act did not have the effect to reimpose the tax. No such intention was expressed, and the contrary clearly appears from related provisions of the 1928 Act. Furthermore, Congress was without power to recreate the liability of a transferee after it was discharged, as that was a liability arising *in contract or under the common law or in equity.* It was not imposed upon the transferee by any statute and could not be reimposed or recreated by statute, once it was discharged.

(4) If Section 612 of the 1928 Act was effective to recreate the liability of the taxpayer, as so recreated *it was still subject to the bar of the statute of limitations as it existed before the enactment of Section 1106 (a) of the 1926 Act.* The instrument in question must be construed in the light of the conditions existing *at*

the time it was executed. At that time there were no taxes *due from the taxpayer.* Congress might repeal the statute that had extinguished *liability for the tax,* but it could not repeal the *fact* that it was the law before it was repealed. The instrument in terms merely purports to waive the time prescribed by law for assessing the taxpayer *for taxes due under the returns referred to.* If there were no taxes *then due from the taxpayer,* aside from all other objections to the proposed assessment it was not authorized *by the terms of the instrument.* The instrument which *in terms* waived only the time prescribed by law for assessing taxes due from the taxpayer, a *separate and distinct corporation,* did not authorize the assessment of the respondent as a transferee for any taxes which were not then due and owing from the corporation referred to and *from which it had been discharged.* There is no time prescribed by law within which the Commissioner may make an assessment for taxes *from which the taxpayer has been discharged.*

(5) Independent of all other objections the instrument in question was ineffectual to authorize the proposed assessment, for the reason that it was not shown that the respondent *had knowledge of the facts* which had resulted in *the bar of the statute* prior to the execution of the instrument. The burden of proof was on the Commissioner to show such knowledge. There is no presumption that the respondent, a separate and distinct corporation, had knowledge of the facts which showed that the bar of the statute had fallen against the taxpayer.

The unsigned instrument verified January 8, 1926, by A. A. Schlesinger was not the act of the respondent, and has no connection with the instrument of Novem-

ber 6, 1926. As found by the Board of Tax Appeals and the Court below, it was merely the act of A. A. Schlesinger.

ARGUMENT.

To follow the order of the argument for the petitioner, the instrument executed by the respondent after the passage of the 1926 Act will be considered first.

I.

The instrument of November 6, 1926, executed by the respondent was ineffectual to authorize the proposed assessment.

A.

This instrument was void on its face.

It was apparent that it was not executed with any authority for the purpose for which it purported to be executed, namely, as a waiver of the time prescribed by law for assessing the transferor of the respondent. The transferee cannot of course extend the period prescribed by law for assessing the transferor. The instrument did not purport to be executed for any other purpose. It must be strictly construed. The Board of Tax Appeals has many times held that such instruments are void.

Bamberg Cotton Mills, 8 B. T. A. 1236;
Carnation Milk Products Co., 15 B. T. A. 556;
Barron-Anderson Co., 17 B. T. A. 686;
Lillie M. Jones et al., 21 B. T. A. 275;
Oswego Falls Corp., 26 B. T. A. 60, 67.

These decisions are supported by the *terms of the statute* and the rules of construction applicable to tax laws.

The statute prescribed the period within which the taxpayer may be assessed and how the period may be extended. The method prescribed for its extension is that it must be by consent in writing *signed by the taxpayer* and the Commissioner. When effectively executed, the period *of the statute* is the primary period *as so extended.*

Loewer Realty Co. vs. Anderson, 31 Fed. (2d) 268, 269 (C. C. A. 2d) Certiorari denied 280 U. S. 558;

L. Loewy & Son vs. Commissioner, 31 Fed. (2d) (C. C. A. 2d) 652;

Florsheim Bros. Dry Goods Co. vs. U. S., 29 Fed. (2d) 875 (C. C. A. 5th) affirmed 280 U. S. 453.

The limitation in the statute upon the authority of the Commissioner to make assessments is for the benefit and protection of the taxpayer and must be strictly construed against the government and liberally in favor of the taxpayer. *U. S. vs. Updike,* 281 U. S. 489, 496. There is no reason why the same rule should not apply to any claimed extension of the period for assessment. There is no authority in the statute for execution by a transferee of the consent in writing which is the *only method* prescribed for extending the period for any assessment the Commissioner is authorized to make. Prior to the 1926 Act there was no authority for the assessment of a transferee and the provision of that Act which *created the liability* of the transferee *to assessment,* expressly limited the authority for

the assessment to a period of one year "after the expiration of the period of limitation for assessment against *the taxpayer*" (Sec. 280 (b)). Thus, the period for assessing the transferee *is based upon the period for assessing the taxpayer.* The obvious reason for that is, that the liability of the transferee is derivative, and secondary to that of the taxpayer. Section 280, the only provision of the statute that refers to a transferee distinguishes throughout between the "taxpayer" and the *transferee,* and uses the terms *in contradistinction.* Section 278 (c) provides:

> "Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment, the tax may be assessed at any time prior to the expiration of the period agreed upon."

Section 277 refers in terms *to the tax imposed by the statute* and the time prescribed for its assessment is "within five years after the return was filed." Only the taxpayer on whom the tax is imposed by the statute is required *to file a return.* There can be no doubt that the word "taxpayer" as used in Section 278 refers *to the one on whom the tax was imposed by the statute,* and no other. There is no room in the terms of that section for any claim that the word "taxpayer" as used therein includes a transferee, and under the rules of construction applicable to all tax laws its meaning cannot be extended by construction for the benefit of the taxing power. The instrument in question was not executed in the manner provided by the statute for extending the period for assessment, the provision for which relates only to the period for assessing *the tax-*

payer upon whom the tax was imposed by the statute. Obviously a transferee is not competent to extend the period for assessing the transferor, upon whom the tax was imposed.

May the instrument in question be considered an informal or common law waiver within the rule of *Stange vs. U. S.* (282 U. S. 270), waiving or extending the period prescribed by the statute *for assessing the respondent as a transferee?* The answer to that question must be no, for the reasons: (1) It does not *by its terms* purport to waive the period for assessing the respondent as a transferee, except as it may be effective to extend the period for assessing the transferor. A waiver is a voluntary relinquishment of a right. If it is not *in terms* effective to relinquish a right, it cannot be made so by construction. It must be strictly construed. (2) The limitation of the time within which the transferee may be assessed *is part of the definition of the liability* of a transferee to assessment. The provision of the statute for assessing a transferee created a new remedy for the enforcement of the liability of the transferee for the tax. It created in effect *a new and additional right of action.* That the new right of action created is summary in its nature, is all the more reason why it should be confined strictly within the limitations of the statute by which it was created. The same section of the statute which created such new right of action *limited the time within which the right may be exercised.* Where a right of action is created, the *time within which the right must be exercised* as provided in the statute which created the right, *operates as a limitation upon the right itself.*

The Harrisburg, 119 U. S. 199, 214;
Central Vt. R. R. vs. White, 238 U. S. 507, 551;
Atlantic Coast Line R. Co. vs. Burnette, 239 U. S. 199, 201;
Davis vs. Mills, 194 U. S. 451, 454.

These decisions must apply with added force to a *summary right of action* such as a right to enforce a *common law liability* by assessment and distraint.

As said by Mr. Justice Holmes in the case last cited:

> "The common case is where the statute creates a new liability and *in the same section or in the same act* limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg*, 119 U. S. 199. But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right" (p. 454) (Italics ours).

Here, the limitation was contained *in the same section* of the statute that created the right.

The Commissioner must find his authority for assessment of a transferee *in the statute*. The limitations therein imposed upon his authority, are as much a part of the statute as that which grants the author-

ity. The time within which the assessment of a transferee may be made as limited by the statute, is not independent of the time within which the taxpayer may be assessed, *but is based upon it.* The instrument in question, *by its terms preserves the rights of the respondent as a transferee to have its liability conditioned upon that of the taxpayer, and limited thereby.* It does not purport to extend the period for assessing the *respondent* as a transferee, except as the instrument may be effective to extend the period for assessing the *taxpayer,* its transferor. Clearly it was not effective for that purpose and consequently it was not effective to extend the period for assessing the respondent as a transferee. There is no element of estoppel involved, insofar as this instrument is concerned. Its insufficiency is a matter of law *and appears on its face.*

B.

At the Time of the Execution of the Instrument, Section 1106 (a) of the 1926 Act Had Operated to Extinguish All Liability for the Tax Referred to Therein.[1]

That section provided that "The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy but shall extinguish the liability."

In the brief referred to by the petitioner in another case and made part of his argument, it is argued that the statute of limitations is not self-executing, that there is no "bar" until the *statute is pleaded* and the

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1) This assumes that the period for assessing the taxpayer had expired before the passage of the 1926 Act.

facts to show that it has run are proved—and that in the meantime, *it may be waived.* That argument will not stand analysis. What must be pleaded *is the fact* that the period of the statute has run. It is that fact which constitutes the bar of the statute, and it must exist *as a fact* before it can be pleaded. *Compare U. S. vs. Updike,* 281 U. S. 489 at page 495, 50 S. Ct. 367 at page 369. To plead the bar of the statute, as in any other pleading, the facts must be pleaded which show that the bar of the statute has fallen. The *bar of the statute* is the operation of the statute upon the facts. These are the facts which show that the period prescribed for the assessment of the tax expired without an assessment. When these facts exist the bar of the statute falls. The legal consequences are a matter of law. In the courts of the United States the legal consequences of the bar of the statute as a general rule, *is to bar the remedy only.*

Campbell vs. Holt, 115 U. S. 620.

As said in *Brent vs. Bank of Washington,* 10 Pet. 361, 596, 617:

> "In The Bank of the United States vs. Donnelly, 8 Pet. 361, this court laid it down as an established principle that the act of limitations operated only to bar the remedy, *not to extinguish the right* or cause of action." (Italics ours).

By the express terms of Section 1106 (a) enacted as part of the Revenue Act of 1926, it was provided that the bar of the statute shall not only operate to bar the remedy *but also to extinguish the liability for the tax.* Thus by the operation of the *express terms*

of that provision of the statute *upon the facts* as they existed *at the time of its enactment*, all liability of the taxpayer upon which the liability of the *respondent* as a transferee depended, was discharged. Whether or not any waiver could thereafter be executed either by the taxpayer or the transferee authorizing an assessment for the tax notwithstanding all liability therefore had been discharged by the statute, is another question that will be considered later.

C.

Section 612 of the 1928 Act Did Not Recreate Any Liability for the Tax That Was Discharged by Section 1106 (a) of the 1926 Act.

Whatever may have been *the purpose of* the repeal of Section 1106 (a) of the 1926 Act *as of the date of its enactment*, Section 612 of the 1928 Act by which the repeal was effected, does not *in terms* express any intention to recreate the tax liability which had been discharged by the section repealed. An act to recreate liability for a tax after it has been discharged and has ceased to exist, necessarily involves the exercise of the taxing power precisely as though the liability imposed by the Act had never existed. To call such an act the recreation of a tax liability is merely to confuse the issue. As held in *Wm. Danzer Co. Inc. vs. Gulf S. & I. R. Co.*, 268 U. S. 633, 636, where a liability created by an act of Congress *is discharged by the same authority*, it is as though it never existed. The fact that the purpose of the act may have been to reimpose a tax liability that once existed but did not exist at the time of the Act to re-impose it, does not affect the question whether the taxing power has been exercised to re-impose the

tax, *in the manner required to impose a tax.* The power to impose taxes is in Congress, but the question of when the power has been exercised, and how it must be exercised to make it effective, is for the courts.

Under the decisions of this Court, to exercise the taxing power vested in it by the constitution, Congress must *in clear and unequivocal language* express its intention to impose a tax and must define in equally clear and unambiguous terms the tax intended to be imposed.

In *Eidman vs. Martinez,* 184 U. S. 583, the Court said:

> "It is an old and familiar rule of the English courts applicable to all forms of taxation, * * * that the sovereign is bound to express its intention to tax in clear and unambiguous language * * *."

And in *Treat vs. White,* 181 U. S. 264, 267, 21 S. Ct. 611, 613:

> "There must be certainty as to meaning and scope of language imposing any tax and doubt in respect to its meaning is to be resolved in favor of the taxpayer."

It is clear from the decisions of this Court, that whatever may have been the purpose of the repeal of Section 1106 (a) as of the date of its enactment, the repealing act was not effective to re-impose any tax that had been discharged for the simple reason that no such intention was expressed in terms. There need be no inquiry by the Courts into any question of *a purpose to impose a tax,* where no tax is imposed in terms.

If it be assumed for the purposes of the argument, that a tax may be imposed by an Act of Congress without clearly expressing the intent to impose one, there are no grounds for claiming that there was any intent to re-impose the tax discharged by Section 1106, in the enactment of Section 612 of the 1928 Act. The *contrary affirmatively appears* in the related provisions of the same act. As stated in the report of the Ways and Means Committee (House Report No. 2, 70th Congress, 1st Session, p. 33) and in the report of the Finance Committee of the Senate (Senate Report No. 960, 70th Congress, 1st Session, p. 41):

> "Section 1106 (a) of the 1926 Act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitations prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 Act is repealed as of its effective date and is replaced by Sections 607, 608, 609 and 610 of this bill."

By Section 607 as the bill was enacted, it was provided that:

> "Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

That section *which was made retroactive,* was plainly inconsistent with the provision in Section 1106 of the 1926 Act, that notwithstanding the operation of the bar of the statute to extinguish the liability for the tax "no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax." Section 607 of the 1928 Act required a credit or refund *of the entire amount of any tax collected after the bar of the statute* of limitations except as it was qualified by Section 611, which qualification *did not remove the inconsistency.*

Sections 607 and 609 of the 1928 Act affirmed *in effect,* all that was done by Section 1106 (a) to extinguish liability for the tax and in addition gave to the taxpayer rights to a refund of taxes paid after the expiration of the statute, which were expressly denied by Section 1106 (a). The later enactment conferring rights denied by Section 1106 (a) would doubtless have operated *to that extent* as a repeal of that provision *as of the date of its enactment* by implication, if it had not been *expressly so repealed,* in its entirety. As the new provisions were enacted to take the place of section 1106 (a) there was no reason why it should not have been repealed in its entirety as of the date of its enactment. Nothing that was granted to taxpayers by Section 1106 (a) was denied to them by the provisions of the 1928 Act, enacted in its place. As said by the Court of Appeals (1st Cir.) in *Commissioner vs. Northern Coal Co.,* 62 Fed. (2d) 742, 745:

> "As a substitute for the provisions of Section 1106, Congress provided in Section 607 (26 USCA § 2607) that any tax assessed or paid after the expiration of the period of limitation

properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer, if a claim therefor is filed within the time allowed for filing claims for refunds. In effect, this section re-enacted the part of Section 1106 of the 1926 Act, which barred all liability for the tax, since Section 607 required to be credited or refunded *as an overpayment* the entire amount collected after the period of expiration for collection had expired; and, further, under Section 609 (26 USCA § 2609) it was provided that any attempt to credit a payment against a deficiency shall be void, if the period for assessing or collecting such deficiency had expired, when it was provided under Section 607 of the 1928 Act that all payments after the expiration of the period for assessment and collection shall be deemed *overpayments* and should be credited or refunded, it extinguished the liability for the tax more effectually than was done by Section 1106 of the 1926 Act, under which the government could retain the amount collected, except so much as was in fact an overpayment."

D.

It Was Not Within the Power of Congress to Recreate the Liability of Respondent as a Transferee After It Was Extinguished.

As said by this Court in *Phillips vs. Commissioner of Internal Revenue*, 283 U. S. 589, 594, 51 S. Ct. 608, p. 610:

> "Section 280 (a) (1) provides the United States with a new remedy for enforcing the existing 'liability, at law or in equity.' The quoted words are employed in the statute to describe the kind of liability to which the new remedy is to be applied and to define the extent of such liability. The obligation to be enforced is the liability for the tax."

The obligation of the transferee to pay the tax is not, however, a liability imposed upon it by statute, but *a liability at law or in equity derivative from* and dependent upon, the liability imposed by statute upon the transferor. In this case the liability of the respondent under its contract to pay the liabilities of its transferor as part of the consideration for the transfer, was an express contract liability to pay all liabilities of the transferor *existing at the time* of the contract. Its liability at law or in equity independent of the contract was the same. Whether considered as an express contract liability, or as a liability arising at law or in equity from the circumstances of the transfer, when once discharged, *it could not be reimposed by any Act of Congress.* That would clearly be in contravention of the 5th Amendment. When the liability for

the tax which was imposed upon the transferor by an Act of Congress prior to the transfer, was discharged *by the taxing power which created it,* it was as though it had never existed. *Wm. Danzer Co. Inc. vs. Gulf & S. I. R. Co.,* 268 U. S. 633; 45 S. Ct. 612.

It may be that the tax thus discharged might thereafter be reimposed upon the taxpayer formerly liable therefor, under the decisions of this Court that a tax may be imposed in respect of past benefits. *Graham vs. Goodcell,* 282 U. S. 409, 429. But whether, when so reimposed, it is called a *new assessment* or a *reassessment* is wholly immaterial. As said by the Court in *Wagner vs. Leser,* 239 U. S. 207, 216, 36 S. Ct. 66, 68:

> "The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration * * *. Of course it does not matter that this is called a reassessment. A reassessment may be a new assessment."

In either case it creates a liability *that did not exist at the time of its imposition or reimposition.* The respondent was liable under its contract or at law or in equity only for the liabilities of its transferor *existing at the time of the transfer.* These included taxes *theretofore imposed* from which the transferor had *not been discharged* by payment or otherwise. As and when they were discharged, the contract of the respondent and *its liability at law or in equity to pay them,* was discharged. The reimposition of any such tax upon the transferor *after it had been discharged,* could not impose upon the respondent any liability for its payment. Such reimposition of the tax would be an independent

and new act of Congress. There would thus be an *independent cause* intervening between the liability of the taxpayer *which was assumed by the respondent as transferee* and the liability reimposed upon the transferor. That injustice might thereby result to the transferor is immaterial. That would be a matter for Congress to consider *in reimposing* the tax from which the transferor had been completely discharged. That statutes creating liability retroactively may have unjust results, is doubtless one of the reasons for the rule that they will not be construed by the courts to create liability retroactively, if such construction can be avoided. See *Wm. Danzer Co. Inc. vs. Gulf & S. I. R. Co.*, 268 U. S. 633 at page 637; 45 S. Ct. 612, 613. To so construe Section 612 of the 1928 Act, even as to the original taxpayer, *would raise grave doubts as to its validity.* It would be to reimpose a tax in the year 1928 originally imposed in 1917 and discharged by the operation of the statute of limitations in 1926. The result would be to impose a tax *upon a limited class,* with no reasonable or equitable basis for the classification. While the members of the class were originally liable for the tax, they had been discharged therefrom by the taxing power which imposed it, *for reasons founded in a sound public policy.* Section 1106 (a) of the 1926 Act, was obviously intended to make the statute of limitations more effective for the purpose for which all such statutes are enacted. As said by this court in *Wood vs. Carpenter,* 101 U. S. 135, 139:

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose

by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary."

In *Graham vs. Goodcell*, 282 U. S. 409, 429; 51 S. Ct. 186, 194, the Court said:

"It is apparent, as the result of the decisions that a distinction is made between a bare attempt of the legislature retroactively to create liability for transactions which, fully consummated in the past, are deemed to leave no room for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of the government where the remedy can be applied without injustice."

It seems obvious that the tax from which the respondent and others of its class had been discharged by the operation of Section 1106 (a) could not be reimposed on them as a class two years later without discrimination and injustice.

As before pointed out herein there were good reasons for making the repeal of Section 1106 (a) retroactive, without giving it the effect to reimpose taxes *which for good reasons* had been discharged. Where a statute is susceptible to two constructions, one of which must give rise to doubtful constitutional questions, and by the other, such questions are avoided, the court will adopt the latter.

U. S. vs. Delaware & Hudson Co., 213 U. S. 366, 407.

Whether or not Section 612 might be sustained as an act reimposing the tax on the original taxpayer, it was obviously not within the power of Congress to thereby recreate a contract or common law liability of a transferee.

E.

There Could be No Waiver Authorizing an Assessment for the Tax After All Liability Therefor Had Been Extinguished.

In the many cases where the question has arisen in the courts below and before the Board of Tax Appeals it has uniformly been held that there could be no valid assessment where the liability for the tax had been extinguished by the statute.

Dobbins vs. Commissioner, 31 Fed. (2d) 935;
United States vs. John Barth Co., 27 Fed. (2) 782; reversed by this court on other grounds.
Pepsin Syrup Co. vs. Schwaner, 35 Fed. (2d) 197;
Griffiths vs. Commissioner, 50 Fed. (2d) 782;
Commissioner vs. Northern Coal Co., 62 Fed. (2d) 742;
Commissioner vs. Oswego and Syracuse R. Co., 62 Fed. (2d) 518;
Peerless Woolen Mills Co. vs. Commissioner, 13 B. T. A. 1119;
Steiner Manufacturing Co. vs. Commissioner, 18 B. T. A. 740, and other decisions of the Board of Tax Appeals.

The liability for the tax had its origin in an Act of Congress. It was extinguished by the same author-

ity. The conditions were therefore, precisely as in the case of *Wm. Danzer Co. Inc. vs. Gulf & S. I. R. Co.*, wherein this court said that on the expiration of the period of the statute "it was as if liability had never existed". (268 U. S. p. 636). Liability for the tax is *the foundation of the authority* of the Commissioner to make an assessment. When the liability for the tax ceased to exist, the foundation of the authority of the Commissioner to make any assessment therefor, was destroyed.

It is claimed in the argument for the petitioner that whether the statute extinguishes the liability for the tax, or merely bars the remedy for its collection, in either case it gives rise to a right which the taxpayer may waive. But where the statute has discharged all liability for the tax, the instrument relied upon as a waiver must not only waive the objections the taxpayer might make to a proposed assessment, *but must create a right in the Commissioner to make an assessment, which does not exist, and can only be created by statute.* The *foundation of the right* of the Commissioner to make an assessment is an existing liability for the tax. That liability was created by statute. When it is destroyed by the legislative power which created it, it cannot be recreated by *any act of the Commissioner* or of the taxpayer. To avoid the effect of the express terms of the statute discharging the liability for the tax, reference is made by the petitioner to a statement in the Conference Report on the bill to enact the 1926 Act in which it was stated:

> "This amendment" (referring to Section 1106(a)) "is deemed advisable because of an opinion in a recent decision of the Court of Claims (Toxaway Mills vs. U. S.)."

The only part of the opinion of the Court of Claims in the *Toxaway Mills* case (61 Ct. Cl. 363), *the effect of which* was changed by Section 1106 (a), is the conclusion stated therein that the statute of limitations as it then stood *did not operate to extinguish the right* but merely to bar the remedy. Insofar as the enactment of Section 1106(a) was prompted by that decision, the only logical conclusion is that it was designed to clarify or change the law in that respect. That there were grounds for difference of opinion as to the correctness of that part of the opinion of the Court of Claims is shown by subsequent decisions of other federal courts *which were uniformly to the contrary,*[1] until the question was finally settled by this Court in accordance with the decision of the Court of Claims, in *Stange vs. U. S.* 282 U. S. 270.

There was no ambiguity *in the provision of Section 1106 (a)* which made the running of the statute operate to extinguish liability for the tax. The provision that there should be no refund unless the taxpayer had overpaid the tax did not raise an ambiguity in any proper sense of the term but was in the nature of a *proviso.* Congress had the right to make the proviso.

If, as claimed by the petitioner, the provision of Section 1106 (a) which in express terms extinguished all liability for the tax after the period of the statute had run, is ineffectual and inoperative *unless and until the statute of limitations is pleaded in a proceeding to collect the tax,* and may be entirely avoided *if in the*

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[1] **Joy Floral Co. vs. Commissioner,** 29 Fed. (2d) 865 **Spear & Co. vs. Heiner,** 34 Fed. (2d) 795; **Pictorial Printing Co. vs. Commissioner,** 38 Fed. (2d) 563; **Columbia Iron Works vs. Brock,** 38 Fed. (2d) 816; **Chicago Ry. Equipment Co. vs. Commissioner,** 39 Fed. (2d) 378.

meantime the Commissioner can obtain a waiver from the taxpayer, *it added nothing to the statute as it existed before.* Provisions in the Revenue Acts intended for the protection of the taxpayer are to be liberally construed in favor of the taxpayer.

U. S. vs. Updike, 281 U. S. 489, 50 S. Ct. 367-369.

Taxing statutes are to be construed most strongly in favor of the taxpayer and against the government.

Gould vs. Gould, 245 U. S. 151, 38 S. Ct. 53, 62 L. Ed. 211;

Bowers vs. New York & Albany Lighterage Company, 273 U. S. 346, 47 S. Ct. 389, 71 L. Ed. 676;

Russell vs. United States, 278 U. S. 181, 49 S. Ct. 121, 73 L. Ed. 255.

This applies equally to limitation provisions incorporated in the revenue acts that operate against the government, *U. S. vs. Updike, supra.*

To construe the provision here in question as contended by the petitioner would be to neutralize it completely and render it entirely meaningless.

As said by the Court in *Atlantic C. L. R. Co. vs. Burnette,* 239 U. S. 199, 201, 36 S. Ct. 75, 76:

> "* * * we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure."

The cases referred to in petitioner's brief on this question are without application.

Burnet vs. Desmornes, 226 U. S. 145, and *Atlantic C. L. R. Co. vs. Burnette,* 239 U. S. 199, involved only

questions of pleading, and that of *Finn vs. U. S.*, 123 U. S. 227, questions of compliance with conditions prescribed by statute, to enforce a claim against the United States. The statement in the opinion in the *Finn* case, that limitation does not operate by its own force as a bar but is a defense which must be pleaded and may be waived, was expressly stated as "the general rule." The *general rule*, in the courts of the United States is, as before pointed out, that the statute of limitations does not extinguish the right but merely affects the remedy. We are not here dealing with the ordinary statute of limitations or with the *general rule*, but with a special limitation upon the authority of a public officer to act under a statute, and with a statute, which *contrary to the general rule of statutes of limitation, not only bars the remedy* but expressly extinguishes the right. Even in such a case we would not contend that the benefits of the statute might not be lost by failure to plead it in a case where the rights it confers are put in issue, and the party claiming such rights is required by the rules of pleading to affirmatively plead them. Such was the case in *Burnet vs. Desmornes*, supra, relied on by the petitioner, wherein Mr. Justice Holmes said:

> "The question before us is a question of pleading and not every matter that may affect the existence of the right at the time of bringing suit must be dealt with by the plaintiff in stating his cause of action. A release under seal destroys a right as fully as prescription could, yet a plaintiff does not have to deny a release in his declaration."

We are not here concerned with any question of pleading. The respondent did plead the statute in the

case before the Board of Tax Appeals, the first opportunity that offered after the proposed assessment. The question here is whether it can be held to have waived the right to show in the case before the Board by proof, *that there was no liability for the tax proposed to be assessed.* The question is whether there is any basis in law for the proposed assessment. Where the tax liability has been discharged by the taxing power which created it, the discharge must be as effectual and complete as though the tax had been paid. The existence *of a liability for the tax* is the basis of the authority of the Commissioner to make *any assessment*. To say that the taxpayer can be precluded by any agreement with the Commissioner from proving the facts which show that the liability for the tax has been discharged, is to say that it may be precluded from showing that in proceeding to make an assessment in a particular case, the *Commissioner is acting without authority of law.* Surely, the doctrine of waiver is without application in such a case.[1]

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1) We have not considered it necessary to argue that Section 1106 (a) was part of the 1926 Act and of the law as it existed at the time of the instrument of November 6, 1926, notwithstanding its retroactive repeal. See Appendix hereto annexed.

F.

The Bar of the Statute Against Assessment of the Transferor Having Fallen Before the Passage of the 1926 Act, Section 280 of That Act Authorizing the Assessment of Transferees Was Without Application to the Respondent.

Prior to the 1926 Act transferees were not subject to assessment. By Section 280 of that act, they were

made subject to assessment for their liability *at law or in equity* for the payment of the tax imposed upon the taxpayer but only "(1) *within one year after the expiration of the period of limitation for assessment against the taxpayer; or* (2) *if the period of limitation for assessment against the taxpayer expired before the enactment of this act but assessment against the taxpayer was made within such period, then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act*" (Italics ours).

By Section 278, subject to exceptions not here material, any proceeding to collect the tax was prohibited unless begun "(1) within six years after the assessment of the tax; or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

The limitation of the time within which transferees could be assessed, *was part of the statute which created their liability to assessment.* It seems clear that where the time for assessing the taxpayer had expired before the enactment of the 1926 Act, there was no authority conferred by Section 280 for the assessment of the transferee, and that section is without application. It was so held by the Board of Tax Appeals in *Caroline J. Shaw Executrix,* 21 B. T. A. 400, upon what seems entirely sound reasoning. *A fortiori* must this be so where as in this case the bar of the statute had discharged the taxpayer and consequently the transferee *from all liability for the tax.*

G.

The Proposed Assessment Was Not Within the Terms of the Instrument of November 6, 1926, and It Cannot be Brought Within Its Terms by Construction.

The instrument must be construed in the light of the conditions and facts known, or which might be presumed to be known, to the party executing it as a waiver, *at the time it was executed.*

The instrument purported to waive the time prescribed by law for making any assessment of taxes due from the *taxpayer* referred to therein under its returns for the years 1917 and 1918. If the bar of the statute had fallen before the passage of the 1926 Act there were no taxes due from the taxpayer under those returns. There is no time prescribed by law *within which the Commissioner may make any assessment of taxes from which the taxpayer has been discharged,* and if the taxpayer at the time of the execution of the instrument had been discharged from all liability for any tax under the returns referred to, the authority of the Commissioner to make the proposed assessment was not within the terms of the instrument. *Waiver is a question of intention.* It cannot be presumed in the absence of language clearly and uniquivocally expressing such intention that it was the intention of the respondent to authorize an assessment for taxes against it, if all liability of the taxpayer *who was primarily liable for the tax* had been discharged. Certainly, the language of the instrument relied on as a waiver, does not require that construction.

H.

Entirely Aside From the Foregoing Propositions, the Instrument of November 6, 1926 Was Ineffectual as a Waiver of the Right of the Respondent to Object to the Proposed Assessment, for the Reason There Was No Proof That It Knew at the Time of the Execution of the Instrument That the Period for Assessing the Taxpayer Had Expired.

A waiver is a voluntary relinquishment of a *known right* and the burden of proving *knowledge of the facts* upon which the right claimed to have been waived depended, is upon the party asserting the waiver.

Panther Rubber Mfg. Co. vs. Commissioner, 45 Fed. (2d) (C. C. C. 1st) 314, 316;
40 *Cyc.*, 252, 259, 261 and numerous cases cited;
27 *R. C. L.* 904, 910 and cases cited.
40 *Cyc.*, 269.

"A presumption of the relinquishment of a known right cannot be rested on a presumption that such right was known, and waiver must be clearly proved."

27 *R. C. L.* 910.

"The evidence must show knowledge, at the time the waiver is claimed to have occurred, of all the material facts that would probably have influenced the conduct of the party."

40 *Cyc.*, 261 and cases cited.

It is altogether improbable that the respondent would have executed any such instrument, if it had

known the facts which showed that all liability of the taxpayer for the tax referred to, had been discharged. It may be presumed that the respondent knew the statutes, but there can be no presumption that it knew the facts *upon which they operated to discharge the taxpayer from liability for the tax.*

Whether the time for assessing the taxpayer referred to in the instrument, had expired and the respondent had been discharged from liability as a transferee at the time of the execution of the instrument, depended *upon the facts,* as to when the returns referred to were filed; whether they were free from fraud, so as to make the statute applicable; whether they were executed in the manner required by the statute to start the running of the statute, and what agreements had been executed before the taxpayer ceased to exist March 1, 1923, extending the period for its assessment. There was no proof that A. A. Schlesinger or the *respondent,* had knowledge of any of these facts. There was no evidence that Schlesinger had ever had anything to do with the tax liabilities of the chemical company. It was developed on the trial before the Board of Tax Appeals *that an unlimited waiver was executed by the taxpayer December 15, 1920, while it was still competent* to execute a waiver, signed by Edward G. Wilmer, its vice-president, and that it was terminated April 1, 1924, *by the act of the Commissioner himself.* (Pet. Br. p. 6). Except for that *act of the Commissioner,* it would have been at least an open question, whether the unlimited waiver executed by the taxpayer would have expired before the passage of the 1926 Act, less than six years after it was given. There is no evidence that the respondent had any knowledge *of that act of the Com-*

missioner. The statement in petitioner's brief from the opinion of this Court in *Stange vs. U. S.*, that *"it must be assumed that an effective and not a futile act was intended,"* is obviously without application as applied to the act of the respondent in executing the instrument in question. The petitioner who signed the instrument knew the facts which rendered it futile, *but there is no evidence in the case that the respondent knew them.* As said by the Court of Appeals for the First Circuit in *Panther Rubber Mfg. Co. vs. Commissioner*, supra:

> "A waiver is the intentional relinquishment of a *known right.* Waiver implies knowledge and is not applicable to one who has acted without full knowledge of all the facts. *The party relying on waivers assumes the burden of proof as to the knowledge of the party making the waiver"* (Italics ours).

II.

The unsigned instrument verified by A. A. Schlesinger January 8, 1926 has no connection with the instrument of November 6, 1926, and is without effect as a waiver.

It was found by the Board of Tax Appeals and the court below, that this instrument was merely the act of A. A. Schlesinger (R. 138, 162). It was not, as asserted in petitioner's brief (p. 16) *signed by the respondent.* It was not signed at all. Everything that was stated in the affidavit attached to it, is *entirely consistent with the fact that the respondent may have expressly refused to have anything to do with it* and

there is no evidence that it did. The respondent could not deny the facts stated in the affidavit. It was not stated that it was made by the affiant *as an officer of the respondent* or by its authority. The facts stated were appropriate to show the acquaintance of the affiant with the matters stated in the instrument to which the affidavit related. The *only purpose* of the instrument as stated therein, was to call the attention of the Commissioner to a previous ruling he had made to the effect that the Chemical Company was affiliated with the Newport Mining Company for the year 1917 which he had apparently overlooked. Any one might call the Commissioner's attention to an oversight.

The Newport Mining Company joined in the protest (R. 59), so that it purported to be made for it as well as for the Chemical Company. A. A. Schlesinger who made the affidavit was one of the five owners (stockholders) of both companies at the time they transferred all of their assets. As such, he was a transferee of the dissolved corporations and liable for the payment of their tax liabilities.

Regulations 69, Art. 1291, 1926 Act;
Updike vs. U. S., 8 Fed. (2d) 913;
Cook on Corporations, (8th Ed.) Vol. 3, Sec. 673, p. 265.

The assumption that only the respondent was interested in the protest to which the affidavit was attached is entirely unwarranted. That *respondent* as part of the consideration for the transfer to it of the assets of the *Chemical Company* had assumed the payment of its liabilities, did not relieve the stockholders of the dissolved corporation of their liability as transferees. See *Opinion General Counsel*

of the Bureau of Internal Revenue, Cum. Bull. V-2, p. 79 (July to December 1926). That this was understood by A. A. Schlesinger, if not by counsel for the Commissioner, is indicated by the record (R. 27). There is no evidence *that the respondent had assumed the liabilities of the Newport Mining Company,* and the stockholders of that Company which had transferred all of its assets and had been dissolved, had an interest in having the Chemical Company included in the consolidated return. Aside from the fact that A. A. Schlesinger was himself liable as a transferee for both the *Chemical Company* and the *Mining Company,* there is no evidence that the respondent was financially able to pay the sum of $211,222.75 which was then being asserted as a deficiency against the *Chemical Company* (R. 53, 54).

The Commissioner had no right to rely on the unsigned instrument. There is no evidence that he paid any attention to it, and under a previous ruling of the Department, IT 2089, Cum. Bull. IH-2, p. 286, he was not required to do so.

As stated in that ruling:

"The letter of protest and briefs of argument filed with the Income Tax Unit as authorized by Treasury Decision 3616 (pp. 275-278) must be signed by the taxpayer or his duly authorized agent or attorney.

The statements of fact relied upon by the taxpayer in support of his protest must be furnished in the form of an affidavit and signed by the taxpayer. The affidavit will not be accepted under any circumstances if signed by taxpayer's attorney or other representative. Statements

of fact by disinterested persons submitted by the taxpayer in support of his protest should be in the form of an affidavit."

It was not until the Act of 1926 *that there was any statute of limitations applicable to the liability of a transferee. U. S. vs. Updike,* 281 U. S. 489, 494. Until the passage of that act, the Commissioner could take all the time he wanted to determine the liability of the taxpayer *for the purpose of enforcing it against the transferee,* and there was therefore no need for a waiver from the transferee. At the time of this instrument *there was nothing for the respondent as a transferee to waive.*

III.

The bar of the statute had fallen against any assessment of the Chemical Company before the passage of the 1926 Act.

We have followed the order of the argument for the petitioner and left this proposition until the last although in natural order, it would seem to come first.

In the contention that the period for assessing the Chemical Company had not expired before the passage of the 1926 Act, *the petitioner relies on instruments executed in the name of the Chemical Company by H. J. Schlesinger as its Vice-president* (Pet. Br. p. 25). Of these the only ones that need be considered are the one dated December 23, 1924 (R. pp. 57, 58) and the one dated January 12, 1926 (R. p. 61). It is admitted that the others expired by their terms before the passage of the 1926 Act. The claimed validity of these

instruments rests upon the claim (1) that the decree of the Supreme Judicial Court of Maine was void and without effect to dissolve the *Chemical Company*, and (2) that the *respondent* is estopped to deny the validity of the instruments.

1. The Decree of the Supreme Judicial Court of Maine, Was Not Void or Open to Collateral Attack in this Proceeding.

There is no indication in the record that that question was raised before the Board of Tax Appeals. On the contrary, it was assigned as error in the petition for review of the decision of the Board of Tax Appeals, *that the Board erred in not finding that the Chemical Company* ceased to exist after the transfer of its assets (R. p. 147). As a matter of fact, it did so hold. There was no evidence that it so ceased to exist, other than the decree of the court dissolving it. Assuming that the petitioner may now take a contrary position, we refer to what is said in the opinion of the court below on that question (R. p. 163), and to the following authorities:

Hall vs. Law, 101 U. S. 461, 463, 364.
Harvey vs. Tyler, 2 Wall. 328, 342-346.
Vorhees vs. Bank of U. S. 10 Pet. 449, 472, 474, 478.

The Supreme Judicial Court of Maine is the highest court of the state. Its decision involved the construction and application of a state statute, and insofar as this court is concerned, *was the act of the state itself.*

Twining vs. New Jersey, 211 U. S. 78; 29 S. Ct. 14, 16.

The decision of the highest court of the state upon a question of local state law is controlling with the federal Supreme Court, no federal question being involved.

Palmer vs. Ohio, 248 U. S. 32, 39 S. Ct. 616;
Ill. C. R. Co. vs. Chicago, 176 U. S. 646, 20 S. Ct. 509;
Clarke vs. Clarke, 178 U. S. 186.

Three years after the date of the decree, March 1, 1920, the corporation ceased to exist for all purposes.

R. S. Maine, Chap. 47, Sec. 77.
Shore Line Road vs. Maine Central R. R., 92 Maine 476.
Carter vs. Stewart Drug Co., 115 Maine, 289.
Oklahoma Natural Gas Co. vs. Oklahoma, 273 U. S. 257.
Crossman vs. Vivienda Water Co. (Calif.) 89. Pac. 335, 336, 337 and numerous authorities referred to therein.

It is suggested that there was identity of interest, and control between the Chemical Company and the respondent which made it in substance a mere continuation of the *Chemical Company* (Pet. Br. p. 27). That claim is without support in fact or in law. While the stockholders of the Chemical Company and the original stockholders of the respondent were the same five individuals (R. pp. 34, 129-130) one of whom was *H. J. Schlesinger*, the two corporations were distinct, and organized under the laws of different states. The statement that the respondent was organized to take over the business of the Chemical Company (Pet. Br. p. 19) is without support in the record. At the time it acquired the assets of the Chemical Company it acquired the assets of the Gogebic Steel Company, the

Western States Coke Company and part of the assets of the Newport Mining Company (R. pp. 15-17, 38). The charter of any of the companies was not offered in evidence, and there is no proof that the respondent carried on the business of the Chemical Company *or that it was authorized by its charter to do so.*, H. J. Schlesinger parted with all of his interest in the respondent in the spring of 1922 and thereafter had no connection with it (R. p. 28). *All of the instruments executed by him as waivers were after that date.* There is no showing in the record that any of the other five stockholders of the Chemical Company retained their interest in the respondent *during the period when instruments relied on by the respondent as waivers were executed,* except as may be inferred from the fact that A. A. Schlesinger appears to have been its president in the year 1926. The respondent insofar as the record discloses was interested only in the tax liabilities of the *Chemical Company,* whereas both *H. J. Schlesinger* and *A. A. Schlesinger* had an interest of their own in the tax liabilities of the Chemical Company *and also in those of the Newport Mining Company* which were involved with those of the Chemical Company. They were transferees of both the dissolved corporations and as such liable for their unpaid tax liabilities, notwithstanding the assumption by the respondent of the liabilities of the Chemical Company.

Regulations 69, Art. 1291, 1926 Act.
Cook on Corporations (8th Ed.) Vol. 3, Sec. 673, p. 265.
Updike vs. U. S., 8 Fed. (2d) 913.
Opinion General Counsel, Cum. Bull. V-2, p. 79 (July to December 1926).

All of the protests in connection with which the so-called waivers signed by *H. J. Schlesinger* were given, were based on rulings of the Commissioner denying the affiliation of the Chemical Company with the Mining Company. These protests as shown by the record were initiated by H. J. Schlesinger (R. pp. 45, 46), after he had severed his connection with the respondent. There was no community of interest betwen him and the respondent *during the period when these protests or the waivers here in question were given.*

A corporation is a distinct legal entity from its stockholders, and this fact cannot ordinarily be disregarded for purposes of taxation.

Planters Cotton Oil Co. vs. Hopkins, 286 U. S. 332; 52 S. Ct. 509.

Burnet vs. Clark, decided December 12, 1932; 53 S. Ct. 207, 209.

Burnet vs. Commonwealth Improvement Co., decided December 12, 1932; 53 S. Ct. 198, 199.

The case of *Phillips vs. Lyman H. Howe Films Co.,* 33 Fed. (2d) 891 referred to in the petitioner's brief, involved a statutory merger of the corporate entities of the companies involved.

In re Wolf Mfg. Industries, 56 Fed. (2d) 64; *Lucas vs. Hunt,* 45 Fed. (2d) 781; *Warner Collieries Co. vs. U. S.,* 63 Fed. (2d) 34 and other cases referred to, not before noticed herein, bear no resemblance in their facts to this case and are obviously without application.

2. The Respondent is Not Estopped to Deny the Validity of the Instruments Executed in the Name of the Chemical Company by H. J. Schlesinger as its Vice-president After It Had Ceased to Exist.

As stated above the only ones of these instruments that are in issue, are the ones dated December 23, 1924 and January 12, 1926 (R. pp. 57, 58, 61). It is admitted that the others expired by their terms before the passage of the 1926 Act.

The instrument of December 23, 1924 purported by its terms to be *an agreement in writing* between the *Chemical Company* as the taxpayer *and the Commissioner* (R. pp. 57, 58). It was signed *as an agreement* of and by the *Chemical Company* by H. J. Schlesinger who at the time had no connection with the respondent. The Commissioner was *fully informed* at the time of the execution of the *agreement*, that the other party to it *was not in existence*. He had no right to assume that anyone was a party to *such an instrument* whose name did not appear on it or in connection with it. If it was one of the instruments enclosed with the letter of Charles F. Fawsett dated December 26, 1924, *of which there was no proof*, there was no evidence that Mr. Fawsett who signed the letter as counsel for the numerous corporations referred to in the letter, was employed by or acted for the respondent in transmitting the instruments referred to therein. The respondent was not one of the Companies referred to in the letter and there is nothing in the record to show that the Commissioner *had any knowledge or information at the time of receiving it*, that Mr. Fawsett *had ever acted as counsel for the respondent*. The power of attorney offered in evidence which was given to him and others to represent the respondent

before the department, was given *January 30, 1925*, more than a month after the date of the letter (R. pp. 32, 33). There is a reference in the instrument to a previous power of attorney referred to in the petitioner's brief as having been given September 5, 1923, but the petitioner *did not choose* to offer that instrument in evidence and *its terms are not disclosed.* Not having offered it, he is in no position to claim there was anything in it that supports his contentions. The protest for the Chemical Company that was enclosed with the letter and which was presumably on file and in the hands of the petitioner, *was not offered in evidence.* If it had shown that the respondent had anything to do with it or with the waiver for the Chemical Company which presumably went with it, it must be assumed that it would have been offered in evidence. In any case the Commissioner was fully informed *of the dissolution of the Chemical Company* at the time of the receipt of the letter and could not have been misled as to its authority to execute any waiver that may have been contained in the letter.

There is no evidence in the record as to how the other instrument dated January 12, 1926, likewise executed by *H. J. Schlesinger*, came to the hands of the Commissioner. It stands in the record merely as a paper executed in the name of the Chemical Company by *H. J. Schlesinger* and signed by the Commissioner. There is no evidence as to how the unsigned instrument verified by A. A. Schlesinger as a protest of the Chemical Company and the *Newport Mining Company*, January 8, 1926, came to the hands of the Commissioner. He had no right to assume that the respondent was responsible for it. There is no evidence that the Commissioner placed any reliance upon it and as

shown above he had no right to do so. The only one of the several protests offered in evidence, with which the respondent was shown to have had any connection, was the first which was filed in the name of the Mining Company in October, 1923 (R. pp. 35, 38). Its only connection shown with that is, that it was verified by H. H. Springford in several capacities, one of which was as the Vice-president of the respondent (R. p. 38). It is said in the brief for the petitioner that this showed that at "*that time the respondent was taking an active interest in the tax liability of its predecessor, the Chemical Company*" (Pet. Br. p. 28). At that time it had a real interest in the tax liability of the Chemical Company. The unlimited waiver that had been given for the *Chemical Company* before it went out of existence had not then expired. It remained in force until April 1, 1924 when as admitted it expired *by the act of the Commissioner* (Pet. Br., Footnote p. 29). The fact that the respondent sanctioned that protest, does not make it responsible for the subsequent protests with which it was not shown to have had anything to do. H. J. Schlesinger was present throughout the trial of the case before the Board of Tax Appeals under subpoena as a witness for the government (R. p. 64). As shown by the record he was not placed on the stand, or called upon to explain the execution of the instruments as waivers that were executed by him in the name of the Chemical Company *when there was no such company in existence.*

A. A. Schlesinger was on the stand as a witness for the petitioner but was not asked to explain his verification of the unsigned instrument of January 8, 1926 which did not purport to be executed by him with any authority of the respondent.

The petitioner is not in position to *rely on inferences* to establish an estoppel, when he was in position to prove the facts explicitly.

> "Where an equitable estoppel is relied upon the facts upon which it is based must be proved with particularity and precision and nothing can be supplied by inference or intendment."
>
> *Standard Sanitary Mfg. Co. vs. Arrott* (C. C. A. 3d), 135 Fed. 750, 757.
>
> *Ruling Case Law*, Vol. 10, p. 845, Sec. 150.

> "The burden of proof rests on the party setting up an estoppel to show the grounds on which it rests, and, as a pleading in estoppel should be certain in every particular and leave nothing to mere inference or intendment, so the evidence to support it must be clear, precise and unequivocal."
>
> *Ruling Case Law*, Vol. 10, p. 845, Sec. 150.

> "For the application of that doctrine there must generally be some *intended deception in the conduct or declaration of the party to be estopped*, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. In all this class of cases * * * the doctrine proceeds upon the ground of *constructive fraud or of gross negligence, which in fact implies fraud.*" (Italics ours.)
>
> *Brant vs. Virginia Coal & Iron Co.*, 93 U. S. 326, 335.

There was no evidence of fraud or intended deception on the part of the respondent. It was expressly found by the Board of Tax Appeals that there were no misrepresentations by the respondent and that the pe-

titioner was not misled by any representations, acts or conduct *of the respondent* (R. pp. 142, 143). Upon this as upon every other question of fact in the case, the decision of the Board of Tax Appeals which is supported by evidence is conclusive.

Phillips vs. Commissioner, 283 U. S. 589; 51 S. Ct. 608, 612.

If the evidence was open to conflicting inferences the findings in favor of the respondent are conclusive.

The doctrine of estoppel is obviously not applicable. Where all of the essential facts in the situation are known to the party setting up the estoppel, there can be no estoppel.

Hirning vs. National Reserve Bank (C. C. A. 8th) 52 Fed. (2d) 382, 388 and numerous cases cited therein.

Grouf vs. State National Bank (C. C. A. 8th) 40 Fed. (2d) 2, 7.

Central Improvement Co. vs. Cambria Steel Co. (C. C. A. 8th) 210 Fed. 696, 718.

The respondent was not subject to assessment prior to the passage of the 1926 Act, and was free to contest any excessive claim for tax liabilities of the Chemical Company that might be made against it as a transferee.

Williamsport Wire Rope Co. vs. U. S., 277 U. S. 551; 48 S. Ct. 587.

Phillips vs. Commissioner, 283 U. S. 589; 51 S. Ct. 608, 612.

During the period while the waivers in question were being accepted by the Commissioner *it was wholly immaterial whether they were valid or not.* As before

stated, until the passage of the 1926 Act there was no statute of limitations applicable to transferees. *(U. S. vs. Updike,* 281 U. S. 489, 494.) After the taxpayer had transferred all of its assets, the tax could be collected only from the transferees *and as to them there was no statute of limitations during the period the so-called* waivers were being received and accepted by the Commissioner. That may well explain his readiness to accept anything that was offered as a waiver without inquiry. The fact that he had been informed of the dissolution of the *Chemical Company* and it had made no return since its return for the year in which it was dissolved, 1920, should at least have put him on inquiry as to the authority by which instruments purporting to be executed by it in the years 1923, 1924 and 1926, were executed. *There is no evidence that he made any inquiry.* As a matter *of proximate cause* the government was not prejudiced by the invalidity of the waivers for the Chemical Company received by the Commissioner after it had transferred all of its assets. It was the 1926 Act making transferees subject to assessment but limiting the time within which they could be assessed and otherwise making the statute of limitations applicable to the taxpayer *equally applicable to transferees,* that prevented the tax liability as finally determined by the Commissioner from being enforced against the transferees *which was the only way it could be enforced.* If the government has lost anything, which cannot be assumed, as the plea of the statute of limitations did not admit the correctness of the final determination except for the purposes of the case, *the responsibility rests wholly with the Commissioner.* That the proposed assessments which brought forth the protests were grossly excessive is

indicated by the fact that they were finally reduced by the Commissioner from a peak of $226,710.08 (R. 46, 48) to about $32,000.00 (R. 17). H. J. Schlesinger who appears to have initiated the protests and A. A. Schlesinger who verified the final one, may not have been familiar with the Maine statute which terminated the existence of the Chemical Company for all purposes three years after the date of its dissolution. In any event they were themselves liable as transferees, and their protests were justified. The various determinations of the Commissioner before the 60 day letter purported to be tentative and invited protests. There could be no justification for a delay of nearly ten years in making what purported to be his final determination. As the bar of the statute which was finally raised by the Statute of 1926, was obviously due to the mistakes and inaction of the Commissioner, he has no cause to complain. The statute of limitations, under the circumstances was the proper defense, and it cannot be assumed that it was not a meritorious as well as a legal one. It was a defense favored in the law.

Wood vs. Carpenter, 101 U. S. 135, 139.

CONCLUSION.

In conclusion it is respectfully submitted that the case of the petitioner is without foundation either in law or in equity, and the judgment of the court below should be affirmed.

CHARLES F. FAWSETT,
RICHARD S. DOYLE,
Counsel for Respondent.

APPENDIX.

Senate

70th Congress
1st Session

Report
No. 960

Internal Revenue Bill of 1928

May 1, 1928.—Order to be printed.

Mr. Smoot, from the Committee on Finance, submitted the following:

Report

(To accompany H. R. 1)

* * * * * * *

Sec. 506. Waivers After Expiration of Statute of Limitations.

Section 506 of the House bill amends section 278 (c) and (d) of the revenue act of 1926 so as to provide that the commissioner and the taxpayer may consent, after the statute of limitations has run, to a later assessment or collection of the income, war-profits, and excess-profits taxes imposed by the 1926 and prior acts. The committee believes that this policy is unsound as to the future, and accordingly amended the House bill so as merely to provide that such waivers filed between the date of the enactment of the new act and January 1, 1929, shall be valid even if filed after the expiration of the limitation period in question. As to waivers filed before the enactment of this act but after the expiration of the period of limitation, the committee feels that the matter should be left where it now stands, to be determined under the law in existence at the time the waiver is filed, and by an amendment to the House bill carries that policy into effect.

Copy of Conference Report and statement of the Managers of the House thereon relating to Section 506 as found on page 1 and page 21 of said Conference Report.

House of Representatives

70th Congress
1st Session

Report
No. 1882

Revenue Bill

May 25, 1928—Ordered to be printed.

Mr. Hawley, from the committee of conference, submitted the following:

Conference Report

(To accompany H. R. 1)

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 1) to reduce and equalize taxation, provide revenue, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

* * * * * * *

That the House recede from its disagreement to the amendments of the Senate numbered * * * 170, 171, 172, 173, 174 * * * and agree to the same.

* * * * * * *

Amendments Nos. 170, 171, 172 and 173: These amendments, which relate to the validity of waivers executed after the expiration of the period of limitation intended to be waived, are similar to amendments Nos. 131, 132, 133 and 134 above. The House bill made such waivers effective even though executed after the expiration of such period. The Senate amendment confines the provisions to waivers executed before the expiration of the period and the House recedes.

Amendment No. 174: This amendment makes valid and effective any waiver executed after the expiration of the period of limitation, notwithstanding the effect of amendments Nos. 170 to 173, inclusive, if entered into after the enactment of this act and before January 1, 1929. The amendment also provides that the above amendments to section 278 of the revenue act of 1926 shall not be construed as in any manner

affecting the validity of waivers made prior to the enactment of this act and the House recedes.

Section 278 (c) as enacted provided:

The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed.